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November 18, 2019

Ms. Tina McMaster-Goering
Ambler Road EIS Project Manager
Bureau of Land Management Alaska State Office
222 West 7th Avenue, #13
Anchorage, Alaska 99513

Re: AIDEA Right-of-Way Permit Application, SF 299

Dear Ms. McMaster-Goering:

The Alaska Industrial Development and Export Authority (“AIDEA”) has reviewed recommendations EPA made in a letter to BLM¹ related to BLM’s Draft Environmental Impact Statement on Ambler Road.² EPA maintains that BLM should wait for a mine application to be submitted “in order to allow for a more accurate evaluation of impacts and consideration of alternatives.”³ Also, EPA claims that BLM should consider continuing air access as an alternative to constructing an access road until a mine project has been permitted, approved and financed for development.⁴ EPA maintained that a road was not needed in the shorter term exploration phase, and that an air access alternative would reduce project impacts.⁵

EPA completely ignores the fundamental importance of the road in facilitating the Ambler Mining District’s mineral exploration and development. Courts have found that it is completely reasonable for a permitting agency to rely on a project’s *potential* to catalyze development to show its purpose and need. BLM should continue to move the project forward, consistent with Congress’s intent that the road facilitate development of these mineral rich areas.

¹ Jill A. Nogi, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 10, Letter to Tina McMaster-Goering, Project Manager, Ambler Road, Bureau of Land Management, (October 29, 2019) (“EPA BLM Letter”).

² U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, DOI-BLM-AK-F030-2016-0008-EIS, Ambler Road Environmental Impact Statement, Draft (August, 2019) (“DEIS”).

³ EPA BLM Letter, at 11.

⁴ *Id.* at 2.

⁵ *Id.*

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The Road is Legitimately Needed to Spur Economic Development

It was entirely reasonable for BLM to rely on economic development and mineral exploration objectives as demonstrating a need for the road.⁶ Courts have held that an environmental impact purpose and need statement for a project may reasonably rely on a general goal to increase economic development. Customers do not need to be “standing in line” to show that there is a legitimate need for the project.

In a very similar situation, the Ninth Circuit Court of Appeals considered an Alaska Railroad Corporation (“ARRC”) proposal before the federal Surface Transportation Board (“STB”) to construct a thirty-five mile rail extension from the railroad’s main line, near Wasilla, to Port MacKenzie.⁷ Port MacKenzie and the Matanuska-Susitna Borough advocated for the extension to increase port traffic and economic development in the area.

The Court held that the STB reasonably relied on the project’s potential to catalyze economic development to demonstrate a need for the rail extension. Port MacKenzie’s aspirations for increased traffic and generalized goals to increase economic development showed a legitimate need for the project.⁸ As the Court stated:

...[T]he statement’s aspirational quality does not mean that the rail line will not serve a purpose as a catalyst for economic development. We have a classic chicken-or-the-egg conundrum, and we are not convinced that the shippers must stand in line before there is sufficient need demonstrated for a rail line.⁹

The STB was entitled to interpret the “public need” it would consider broadly. The need included support from private interests in providing more efficient and cost-effective transport services and the State of Alaska, in its financial support for the project.¹⁰ The Statement of Purpose and Need reasonably defined the project’s objectives in light of the ARRC’s objectives and the agency’s statutory authorization.¹¹

The Court held that the STB properly gave “due weight” to ARRC’s views, since it was a quasi-public agency.¹² It was not the Court’s role, it stated, to decide which communities were entitled to important rail development projects. That decision was committed in the first instance

⁶ Under CEQ’s regulations implementing NEPA, 40 C.F.R. §1502.13, the Purpose and Need Statement “shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”

⁷ *Alaska Survival v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013).

⁸ *Id.* at 1086.

⁹ *Id.*

¹⁰ *Id.* at 1085.

¹¹ *Id.*

¹² *Id.* at 1086.

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to the federal agency's discretion, which should reflect the applicant's objectives.¹³ *Alaska Survival* is controlling precedent on this issue in the Ninth Circuit.¹⁴

The Ninth Circuit Court's conclusions in *Alaska Survival* apply directly in this case. Like the rail extension, the road will serve as a catalyst for economic development, to make mineral exploration and development more feasible. That "aspiration" demonstrates a reasonable need. Constructing the road during the exploration phase will help lead to development of the mines. If permitting for the road is not in place beforehand, mine development may be less feasible.

AIDEA's view must be given due weight, in the same way as the Court relied on ARRC's assessment. AIDEA, too, is a quasi-public agency, a public corporation of the State and political subdivision of the Department of Commerce, Community and Economic Development, but with a separate and independent legal existence.¹⁵ AIDEA is providing financial backing for the industrial access road based on the road's potential to catalyze economic growth and natural resource development in the State. AIDEA's view directly supports permitting the road before a mine is in operation.

Courts have allowed agencies considerable discretion in adopting a purpose and need statement.¹⁶ They have found that including a broad need, such as economic development, legitimately supports a purpose and need statement.¹⁷ In fact in *Cachil*, the agency included both the need to provide a vehicle of substantial economic development *and* the benefits of that development as purposes of a tribal project.¹⁸ It is entirely proper for BLM to rely on Ambler Road's potential to promote Ambler Mining District mineral exploration and development in showing a need for the road project.

ANILCA's Legislative History Supports Permitting the Road Now Without Waiting for a Mine to be In Operation

When Congress established the Gates of the Arctic National Preserve ("GAAR") at Section 201(4)(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), it guaranteed that the Department of the Interior, in consultation with the Department of Transportation, would

¹³ *Id.*

¹⁴ The U.S. District Court for the District of Alaska affirmed the Army Corps of Engineer's issuance of a Section 404 permit for the Port MacKenzie rail extension project. *Cook Inletkeeper v. U.S. Army Corps of Engineers*, 22 F. Supp. 3d 1010 (2014) (Alaska Railroad Corporation and Matanuska-Susitna Borough intervenors).

¹⁵ AS 44.88.020.

¹⁶ *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke*, 889 F.3d 584, 603 (9th Cir. 2018) ("*Cachil*"). *Honolulutraffic.com v. Federal Transit Administration*, 742 F.3d 1222, 1230 (9th Cir. 2014).

¹⁷ *Cachil*, 889 F.3d at 603-04; *Honolulutraffic.com*, 742 F.3d at 1230.

¹⁸ *Cachil*, 889 F.3d at 603-04.

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permit a right-of-way through the Kobuk Boot for transportation to and from the Ambler Mining District to the Alaska Pipeline Haul Road (Dalton Highway).

Congress contemplated that the access road would facilitate the Ambler Mining District mineral exploration and development, and did not require that a mine be built before the road was permitted. In its 1978 Committee Report on H.R. 39,¹⁹ the Senate Energy Committee explained that “several new mines may be developed”²⁰ in the years following ANICLA’s passing and stated that it intended that the Secretary of the Interior grant a right-of-way through the Boot when there was a need for it:

The Committee provided for a transportation corridor through the Kobuk unit to connect the mineral district with an existing haul road along the trans-Alaska oil pipeline. Should the need arise for a transportation corridor through this area, the Committee intends that the Secretary will grant a right-of-way for that purpose.²¹

This provision was interpreted as guaranteeing access to the Ambler District to continue the development of the area’s resources. As stated in the Committee Report: “The Committee is commended...for guaranteeing access to the Ambler area across the Gates of the Arctic unit; without such access development of these resources would have been precluded.”²²

The significance of the Ambler District was well known at the time ANICLA was developed. Both the House and Senate agreed to delete the area from the included lands, and the boundaries of the Parks and Preserves were drawn to specifically exclude significant known deposits of critical minerals, including the Ambler Mining District.²³ Debate on the enacted version of the Bill made it clear that mining companies were to “proceed to explore these world class deposits of precious and needed mineral resources.”²⁴ The transportation corridor would aid mining companies’ mineral exploration.

Congress’s intent in authorizing access is key. An agency must consider the statutory context of the proposed action and any other Congressional directives, along with the applicant’s

¹⁹ The genesis of the special access provision for crossing the Kobuk Boot is found most directly in the Alaska lands bill approved by the Senate Energy Committee in 1978. The bill is reprinted in the *Report of the Committee on Energy and Natural Resources United States Senate Together with Minority, Additional, and Supplemental Views to Accompany H.R. 39*, S. REPT. NO. 95-1300, at pp. 1-102 (1978). These bill subsections parallel ANILCA’s Section 201(4)(b)-(e) as enacted.

²⁰ S. REP. NO. 95-1300 at 123 (1978).

²¹ *Id.*

²² *Id.* at 386.

²³ 96 CONG. REC. 21584 (Aug. 18, 1980) (statement of Sen. Jackson).

²⁴ *Id.* at 21889 (Aug. 19, 1980) (statement of Sen. Bayh); *see also id.* at 21649 (Aug. 18, 1980) (statement of Sen. Tsongas) (“The mining community is assured that mining companies in the Ambler area...can proceed.”)

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objectives, in framing its Purpose and Need statement. As the Ninth Circuit has explained: “Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS.”²⁵

Here, Congress did not, in its statutory language, Committee Reports, or other statements of legislative intent, require that a mine be built and operational before the road could proceed. Congress’s discussions reflect its intent for a transportation corridor to allow “for the growth and development of [Alaska’s] resources.”²⁶ Development of the Ambler Mining District’s resources as Congress noted means that, if permitting for a road is not in place beforehand, mine development may be less feasible. There is no requirement that the mine be completed before the road may be permitted.

Congress Did Not Provide For An Air Transportation Access Alternative

In statutory language, ANILCA explicitly states that access to the Ambler Mining District from the Alaska Pipeline Haul Road be provided via surface transportation.²⁷ Section 201(4)(b) states:

Congress finds that there is a need for access for surface transportation purposes across the Western (Kobuk River) unit of the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road) and the Secretary shall permit such access in accordance with the provisions of this subsection.

Limiting access to air transportation during the exploration phase would be inconsistent with the statute’s express terms.

Further, ANILCA Section 201(4)(d) requires that the Secretary grant a route right-of-way for access, a process appropriate for surface transportation. It authorizes the preparation of an EIS “solely” for the purpose of determining the most desirable route for the right-of-way, not alternative types of transportation.²⁸ The statute does not contemplate any other alternatives to surface transportation, such as air travel or any other means of transportation to access the Mining District. Instead, it guarantees *surface transportation access across* the Preserve.

The legislative history further reinforces this conclusion. When describing transportation access through the GAAR, members of Congress generally refer to “surface transportation” or a term with the same meaning. Congress was well aware that the Ambler District was “virtually

²⁵ *Alaska Survival*, 705 F.3d at 1084-1085 (quoting *Westlands Water Dist. v. U.S. Dep’t. Of Interior*, 376 F. 3d 853, 866 (9th Cir. 2004).

²⁶ *Id.* at 21658 (statement of Sen. Roth).

²⁷ Pub. L. 96-487, 94 Stat. 2371, 16 U.S.C. § 410hh(4)(b).

²⁸ Pub. L. 96-487, 94 Stat. 2371, 16 U.S.C. § 410hh(4)(d).

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surrounded by three Park Service wilderness areas and two wildlife refuges.”²⁹ The legislative history consistently refers to the inadequacy of the current surface transportation when guaranteeing the right-of-way. For example, when discussing the access provision included in Section 201(4), the House found there was a “demonstrable need” for improved surface access in the area.³⁰ Similarly, the Senate Committee on Energy and Natural Resources intended for a “transportation corridor” to cross the Kobuk Boot portion of the Preserve.³¹ Congress remedied obstacles to transportation access by expressly authorizing selection of a surface transportation route to the Ambler Mining District.³²

For these reasons, BLM should proceed to conduct its permitting process so that the road may fulfill important purposes of spurring mining exploration and development. If BLM waits for a mine, the State will lose a critical benefit: that the road can serve as a catalyst for mineral exploration and development.

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²⁹ 126 CONG. REC. 18719 (July 21, 1980).

³⁰ H.R. REP. NO. 96-97, pt. 1 at 155-56 (1980).

³¹ S. REP. NO. 95-1300 at 123 (1978).

³² *Id.* In the DEIS, BLM considered air access as an alternative, but eliminated that mode from detailed analysis. BLM determined that airplanes or helicopters would not provide surface access and would not adequately support hauling mining equipment and heavy loads. DEIS at 2-1. BLM properly dismissed air as an alternative since air transport was inconsistent with statutory language and legislative intent. Additionally, a permitting agency’s duty under NEPA is only to analyze alternatives that appear reasonable and appropriate for study, consistent with the primary objectives of the permit applicant. Roosevelt Campobello International Park Commission et al v. U.S. E.P.A., 684 F.2d 1041, 1047 (1st Cir. 1982) (finding EPA’s choice of alternative sites for a refinery was properly focused by the primary objectives of the permit applicant to identify a deep water port that would accommodate a supertanker.) Here, even if air transportation access was consistent with the statute and legislative intent, BLM would still not be obligated to consider this alternative because air access would not reasonably or feasibly permit mining exploration and development.

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